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No. 76-1238

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

W. F. FREDEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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**MEMORANDUM FOR THE UNITED STATES
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On April 16, 1976, the Federal Energy Administration (FEA) issued a subpoena to petitioner in connection with an investigation of the Companies¹ compliance with FEA's Mandatory Petroleum Allocation and Price Regulations (10 C.F.R. Parts 210, 211, and 212). FEA had discovered during an audit of a public utility corporation that the Companies had sold the utility a quantity of No. 2 diesel fuel.² Upon examination of documents relating to that sale, FEA issued a Notice of Probable Violation to the

¹"Companies" refers to Port Arthur Towing Co. and its subsidiary, Palmer Midstream Services, Inc. Petitioner is the president of these firms.

²The sale of No. 2 diesel fuel was deregulated effective July 1, 1976. See 41 Fed. Reg. 17512.

Companies, asserting that the sale was not in compliance with the applicable regulations. The subpoena was designed to obtain information to determine whether the Companies' apparent violations were limited to one sale or were more extensive.

Petitioner refused to appear or to produce the subpoenaed documents. On July 16, 1976, the United States sought enforcement of the subpoena. The district court held that the subpoena "should be quashed and held for naught" (Pet. App. 16), concluding that it was "overbroad, arbitrary and seeks documents beyond the scope of any legitimate inquiry, [that and] such documents are irrelevant to any material issue or to any lawful purpose" (*ibid.*). The district court enforced the subpoena only to the extent that it sought information relating to the single sale that had sparked the investigation (Pet. App. 15).

The Temporary Emergency Court of Appeals reversed, holding that the subpoena was "issued for a lawfully authorized purpose, is in all respects lawful and proper and should be enforced" (Pet. App. 13-14).

1. Petitioner contends (Pet. 6-7) that by directing the district court to enforce the subpoena the court of appeals has denied him a meaningful adversary hearing in which he could introduce evidence in support of certain defenses traditionally available in subpoena enforcement proceedings.

Subpoena enforcement proceedings are summary in nature. Administrative agencies have broad authority to gather information in connection with lawful investigations. See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501. The agency need not show probable cause to obtain enforcement of the subpoena; it is enough that the

investigation "will be conducted pursuant to a legitimate purpose, [and] that the inquiry may be relevant to [that] purpose" (*United States v. Powell*, 379 U.S. 48, 57).

The court of course retains the power of inquiry to ensure that its process is not abused. *United States v. Powell, supra*, 379 U.S. at 58. The summoned party may challenge the enforcement on appropriate grounds, and it is entitled to an adversary hearing if one is necessary. *Donaldson v. United States*, 400 U.S. 517, 529; *Reisman v. Caplin*, 375 U.S. 440, 449. In the present case petitioner was afforded a full opportunity to raise appropriate defenses, and he persuaded the district court after oral argument to limit enforcement of the subpoena. Now, after this holding has been reversed, petitioner complains that he has been deprived of an opportunity to introduce evidence.³ But petitioner did not ask the district court to be allowed to introduce evidence. Indeed, petitioner stated in his brief in the court of appeals (Br. 12; emphasis added):

Under the circumstances and the record offered here, no fuller hearing was indicated *or needed* to protect the rights of the summoned party, and the court did not abuse its discretion by deciding the case summarily.

Having declared his satisfaction with the procedure employed by the district court, petitioner cannot now reverse course.⁴

³The court of appeals did not overreach its authority in directing the district court to enforce the subpoena. The mandate of an appellate court controls on all issues that were raised or could have been raised on appeal. See, e.g., *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-256; *Foley v. Smith*, 437 F. 2d 115, 116 (C.A. 5).

⁴In directing the district court to enforce compliance with the April 16, 1976, subpoena, the court of appeals stated that the subpoena was "in all respects lawful and proper" (Pet. App. 14). With the record of the show-cause proceeding before it, the court of appeals was of the view

2. Petitioner also contends (Pet. 8-10) that because the sale of No. 2 diesel fuel is no longer regulated by FEA, the subpoena should not be enforced. Petitioner argues (Pet. 9) that "FEA is without authority to institute enforcement proceedings based upon information which does not relate to the [single] sale [to the public utility], and discovery of that information is clearly irrelevant to any lawfully authorized purpose."

The Emergency Petroleum Allocation Act of 1973, 87 Stat. 629, as amended, 15 U.S.C. (Supp. V) 753 and 754, authorized FEA to regulate the price of No. 2 diesel fuel and to issue subpoenas to determine compliance with its regulations. The subpoena sought information concerning sales of No. 2 diesel fuel during a period when the sale of No. 2 diesel fuel was subject to FEA's Mandatory Petroleum Allocation and Price Regulations. The subsequent deregulation of No. 2 diesel fuel does not preclude the FEA from investigating violations of the regulations that may have taken place while those regulations were effective.

The general savings statute, 1 U.S.C. 109, consistently has been construed to provide that an agency may take enforcement actions concerning violations of temporary regulations, at least where the enforcement actions commenced before the expiration of the regulations and involve private activity during the effective period of the regulations. *United States v. California*, 504 F. 2d 750, 754 (T.E.C.A.), certiorari denied, 421 U.S. 1015; cf. *United States v. Empire Gas Corp.*, 547 F. 2d 1147 (T.E.C.A.).

that petitioner's claims of abuse were insubstantial. Given petitioner's failure to do more than assert, in a conclusory fashion, that bad faith, harassment, and abusive conduct by the agency are involved here, and given his failure to describe the nature of the evidence he would seek to introduce, petitioner has not in any event established an entitlement to an evidentiary hearing.

certiorari denied, March 7, 1977 (No. 76-936).⁵ The Companies might be subjected to money penalties or other sanctions for any violations of the regulations they may have committed before their recission, and FEA is entitled to investigate to determine whether such sanctions should be imposed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.,
Solicitor General.

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⁵Petitioner erroneously claims (Pet. 8) that the court of appeals' ruling here is contrary to its own decisions in *Tasty Baking Co. v. Cost of Living Council*, 529 F. 2d 1005 (T.E.C.A.), and *United States v. California*, *supra*. *Tasty Baking* concerned a challenge to a Cost of Living Council order denying the company's request for an exemption from certain requirements of regulations under the Economic Stabilization Act. The court refused to enforce the regulations not because they had lapsed during the pendency of the proceeding, but because the regulations, promulgated without proper notice, were never effective. In *California* the enforcement proceeding was not pending at the time the statute lapsed, and the acts in question were not committed prior to the expiration of the statute. Here, however, the subpoena was issued prior to the deregulation of No. 2 diesel fuel and sought information concerning acts committed during the period of regulation. In any event, any conflict among different decisions of the same court would be for that court to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902.